Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

No. 82-716

In the Supreme Court of the United States

OCTOBER TERM, 1982

EL PASO COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

CARLETON D. POWELL
WILLIAM A. WHITLEDGE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a tax pool analysis, prepared by a corporation's employees in the ordinary course of its business, for the purpose of determining the amount of the corporation's reserve for contingent tax liabilities, "may be relevant" within the meaning of 26 U.S.C. 7602(1), to an Internal Revenue Service audit of the corporation to determine its federal income tax liabilities and therefore subject to production in response to an internal revenue summons.

2. Whether a corporation's tax pool analysis is privileged from disclosure in response to an internal revenue summons issued under 26 U.S.C. 7602.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes involved 1

Statement 2

Argument 7

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Couch v. *United States*, 409 U.S. 322 14

Donaldson v. *United States*, 400 U.S. 517 9

Foster v. *United States*, 265 F.2d 183, cert. denied, 360 U.S. 912 9

Grand Jury Subpoena Duces Tecum (Charles Rice), In re, 483 F. Supp. 1085 12

United States v. *Arthur Andersen & Co.*, 474 F. Supp. 322, appeal dismissed as moot as to one party, 623 F.2d 725, aff'd on other grounds, 623 F.2d 725 12

United States v. *Arthur Young & Co.*, 677 F.2d 211 ..... 5, 9, 11, 12, 13, 14, 15

United States v. *City National Bank & Trust Co.*, 642 F.2d 388 ..... 8, 12

United States v. *Cleveland Trust Co.*, 474 F.2d 1234, cert. denied, 414 U.S. 866 9

Page

Cases—Continued:

United States v. *Coopers & Lybrand*, 413 F. Supp. 942, aff'd, 550 F.2d 615 ..... 10, 11, 12

United States v. *Euge*, 444 U.S. 707 ..... 8, 9

United States v. *First Chicago Corp. & Affiliated Corps.*, 43 A.F.T.R.2d (P.H) para. 79-426 12

United States v. *Garden State National Bank*, 607 F.2d 61 8

United States v. *Khalauf*, 49 A.F.T.R.2d (P.H) para. 82-425 9

United States v. *Kis*, 658 F.2d 526, cert. denied, No. 81-1272 (Mar. 22, 1982) 8

United States v. *Matras*, 487 F.2d 1271 ..... 10, 11, 12

United States v. *McKay*, 372 F.2d 174 9

United States v. *Moon*, 616 F.2d 1043 ..... 8, 12

United States v. *New York Telephone Co.*, 644 F.2d 953 9

United States v. *Noall*, 587 F.2d 123, cert. denied, 441 U.S. 923 ..... 8, 9, 12

United States v. *Norcutt*, 680 F.2d 54 12

United States v. *Powell*, 379 U.S. 48 ..... 4, 7, 8

United States v. *Riley Co.*, 45 A.F.T.R.2d (P.H) para. 80-551 12

United States v. *Shlom*, 420 F.2d 263, cert. denied, 397 U.S. 1074 9

Page

Cases—Continued:

United States v. *Southwestern Bank & Trust Co.*, 683 F.2d 994 12

United States v. *Wyatt*, 637 F.2d 293 9

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 7602 ..... 1, 6, 7, 12

Section 7602(1) 8

15 U.S.C. (& Supp. V) 78c 2

15 U.S.C. 78*l* 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-716

EL PASO COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 682 F.2d 530. The opinion of the district court (Pet. App. 63a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1982 (Pet. App. 59a-60a). A timely petition for rehearing with suggestion for rehearing en banc was denied on September 18, 1982 (Pet. App. 61a-62a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The provisions of Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. 2.

STATEMENT

1. Petitioner is a Texas holding company with 67 subsidiary corporations. Its stock is publicly traded on the New York Stock Exchange (Pet. App. 2a). Federal securities laws require that companies subject to those laws file certified financial statements with the Securities and Exchange Commission on a regular basis. See 15 U.S.C. (& Supp. V) 78c and 15 U.S.C. 78*l*. These financial statements are prepared in accordance with generally accepted accounting and auditing standards and are required to contain a reserve for contingent federal income tax liabilities. Moreover, banks that lend to publicly held corporations may also require that such a reserve be maintained and included in corporate financial statements submitted in connection with loan applications (Pet. App. 5a-6a). Each year, the amount of the contingent liability reserve is computed from an analysis of the corporation's tax returns. Every item on the income tax return that could reasonably be subject to challenge by the Internal Revenue Service is analyzed and an estimate of the corporation's potential exposure for additional taxes is assigned to that item. The total of the estimated amounts assigned to the individual items is the amount of the reserve for contingent future tax liabilities (*ibid.*). The documents utilized in the preparation of the reserve are known by various names, including tax pool analysis, the noncurrent tax account, or tax accrual workpapers (*id.* at 6a).

Although the tax pool analysis for some corporations may be prepared by independent certified public accountants during an audit and certification process, petitioner's own employees in its tax department prepared the tax pool analysis and computed petitioner's contingent tax liability reserve. With respect to each item on the tax return identified as potentially subject to challenge by the Internal Revenue Service, the accounting branch of petitioner's tax

department prepared a memorandum or memoranda discussing the item and the tax treatment accorded it. These memoranda were maintained in various "subject" files in the tax department (Pet. App. 9a). On the basis of these memoranda, petitioner's personnel estimated the corporation's potential tax exposure with respect to each item. Thereafter, petitioner's employees summarized these estimates on worksheets. The four or five worksheets generated by petitioner's tax department each year and the various memoranda supporting the estimates appearing on the worksheets comprise petitioner's tax pool analysis or tax accrual workpapers (*id.* at 9a-10a).

The independent certified public accountants who audit and certify petitioner's financial statements discussed the tax accrual reserve with petitioner's personnel during the conduct of the audits (Pet. App. 49a). During the years in issue (1976, 1977 and 1978), these discussions focused on the fairness and adequacy of the reserve amount (*id.* at 3a, 17a, 49a).

As part of the audit of petitioner's returns for 1976 through 1978, the Internal Revenue agents conducting the audit requested petitioner to provide them with its tax pool analysis. Upon petitioner's refusal to provide those items, an agent issued an internal revenue summons. Petitioner refused to produce the tax pool analysis on the ground that it was not relevant to the Service's investigation. It also contended that the documents were protected by the attorney-client privilege or attorney work-product doctrine because the tax pool analysis "was prepared by, or directly under the supervision of, an attorney or attorneys employed by" petitioner (I-R. 19-20).[1]

---

[1] "R." refers to the five-volume record on appeal.

2. In this proceeding to enforce the summons brought by the government in the United States District Court for the Southern District of Texas, the district court ordered the summons enforced (Pet. App. 43a-58a). In so ruling, the court rejected petitioner's claims that the materials were not relevant to the Service's investigation, or that they were, in any event, protected by any privilege. It concluded that the government had made a sufficient showing of relevance to meet the standard required by *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), and that petitioner had "failed to present any credible evidence" to the contrary (Pet. App. 53a). The court found that the information summoned "would very likely be relevant to * * * the examination being conducted by the Internal Revenue Service" (*id.* at 54a).

The district court also rejected petitioner's defenses based upon the attorney-client privilege and attorney work-product doctrine. It found that there was "no evidence in the record which would support a finding that any particular document was prepared by an attorney acting as such, or by someone under such attorney's control, or for the purpose of rendering legal advice[,] * * * [or] primarily in preparation for litigation" (Pet. App. 50a). Although the director of petitioner's tax department was an attorney, the court found that petitioner had failed to demonstrate a single instance in which that corporate official had acted as an attorney, rather than as a manager or an accountant (*id.* at 50a-51a). Noting that petitioner bore the burden of proof to establish its claim of attorney-client privilege, the district court found that, apart from a blanket assertion, petitioner had made no serious attempt to establish its claim (*id.* at 56a). Accordingly, the court concluded that the policies behind the privilege and the attorney work-product doctrine "would not be furthered" by sustaining the claim of privilege in this instance (*id.* at 58a).

Finally, the court concluded that, even assuming that the documents were privileged when they were created, the record amply demonstrated that the substance of the communications in the documents was either openly discussed with independent auditors or would have been discussed had the issue been raised. These discussions indicated an absence of any intention to maintain confidentiality and were therefore sufficient to destroy the confidentiality necessary to sustain the privilege (Pet. App. 57a).

3. The court of appeals affirmed, with one judge dissenting (Pet. App. 1a-42a). It likewise rejected the argument that the tax pool analysis was not relevant to the income tax audit. As the court of appeals concluded, it was "in fact, hard to imagine a document more likely to shed light on the correctness of * * * [questionable] aspects of a return * * * than the tax pool analysis" (*id.* at 12a). In ruling that the tax accrual papers were relevant, the court noted that its "holding accords with the similar conclusion on the relevance of tax-accrual work papers recently reached by the Second Circuit in *United States* v. *Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982)" (Pet. App. 12a).[2]

The court of appeals also ruled that the attorney-client privilege was inapplicable. First, it upheld the district court's factual finding that petitioner's employees discussed some of the information contained in the tax pool analysis with the company's outside auditors. It therefore ruled that (Pet. App. 17a-18a) since confidentiality was "neither expected nor preserved" with respect to the tax pool

---

[2]Although the court in *Arthur Young & Co.* declined to enforce the summons on the ground that the tax accrual papers were privileged, the court below distinguished *Arthur Young* on the ground that the accountant work product privilege is inapplicable to papers summoned from the taxpayer itself, rather than from outside accountants (see Pet. App. 12a n.7).

analysis, the privilege, which applies only to confidential communications, could not be sustained. As the court saw the matter, the discussions between petitioner's employees and the accountants regarding the tax pool analysis destroyed the confidentiality necessary to sustain a claim of the attorney-client privilege (*id.* at 19a). It concluded that to hold otherwise would require establishment of an accountant-client privilege that is not recognized under federal law (*ibid.*). The court also rejected petitioner's claim of attorney-client privilege on the ground that petitioner made only a blanket assertion of the privilege that was inadequate to sustain its burden of proof with respect to any specific document (*id.* at 20a).

Finally, the court held that the attorney work-product doctrine did not protect against the disclosure of the tax pool analysis. Even on the assumption that petitioner's tax pool analysis otherwise constituted attorney work product, the court concluded that the doctrine did not bar its disclosure because no part of it was prepared in anticipation of litigation. Rather, it was prepared in the ordinary course of petitioner's business (Pet. App. 24a-25a). The court also found unpersuasive petitioner's contention that the public policies requiring full disclosure to independent accountants contained in the securities laws mandated protecting the tax pool analysis. Characterizing as "wholly speculative" (*id.* at 27a) petitioner's assertion that protection was necessary to encourage full corporate disclosure to auditors, the court of appeals found no policy clash between the securities laws and the summons authority granted to the Commissioner by Section 7602 of the 1954 Code.[3]

---

[3]Judge Garwood dissented from the court's holding that the government had made a sufficient showing that the tax pool analysis was relevant to the audit of the return to obtain enforcement of the summons (Pet. App. 36a-37a). While he also dissented (*id.* at 38a-41a)

ARGUMENT

Petitioner seeks review of the decision below enforcing an internal revenue summons requiring it to produce its tax pool analysis and certain supporting documentation. The petition presents two questions: (1) whether the tax pool analysis may be relevant under 26 U.S.C. 7602 to the Internal Revenue Service's investigation of petitioner's tax liability; and (2) whether the tax pool analysis is, at all events, protected from disclosure under either the attorney-client privilege or work-product doctrine.

1. *Relevancy.* a. Petitioner contends (Pet. 11-14) that its tax pool analysis, which contains its "assessment of the questionable positions it took on its return" (Pet. App. 11a), is not relevant to the Service's investigation of its tax liability because the documents were not prepared in connection with the tax return, but rather were developed for financial reporting purposes. But the standard of relevancy does not depend upon whether the information sought was used in connection with the preparation of the taxpayer's returns. In *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), this Court held that in order to obtain enforcement of a internal revenue summons, the government must show, inter alia, that the summoned material may be relevant to the inquiry. The courts of appeals have uniformly held that in order to meet the *Powell* requirement, the government need make only a "minimal" showing of relevancy and that an allegation in an affidavit of the agent who issued the summons that the summoned material is relevant is sufficient to

---

from the ruling that any attorney-client or work-product privilege had been waived because some of the contents of the tax pool analysis were discussed with the accountants. Judge Garwood agreed with the court's conclusion that petitioner had failed to particularize its claims of privilege and had therefore failed to carry its burden of establishing that either the privilege or the work product doctrine protected the tax pool analysis (*id.* at 37a).

establish a prima facie case under *Powell*. Once such a showing is made, the burden shifts to the party challenging the summons to establish that the summoned material is not relevant to the determination of tax liabilities. See, e.g., *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, No. 81-1272 (Mar. 22, 1982); *United States* v. *City National Bank & Trust Co.*, 642 F.2d 388, 389 (10th Cir. 1981); *United States* v. *Moon*, 616 F.2d 1043, 1046 (8th Cir. 1980); *United States* v. *Garden State National Bank*, 607 F.2d 61, 68-70 (3d Cir. 1979); *United States* v. *Noall*, 587 F.2d 123, 125-126 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979).

The terms of the pertinent statute — Section 7602(1) —support a broad standard of relevancy. In that provision, Congress has authorized the Commissioner of Internal Revenue "[t]o examine any books, papers, records, or other data which *may be* relevant or material to [his] inquiry" (emphasis added). As Judge Friendly observed in *United States* v. *Noall*, 587 F.2d 123, 125 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979), "Congress acted advisedly in using the verb 'may be' rather than 'is', since the Commissioner cannot be certain that the documents are relevant or material until he sees them." What is more, the scope of the authorized inquiries is likewise broadly cast to include "ascertaining the correctness of any return, making a return where none has been made, [and] determining the liability of any person for any internal revenue tax * * *" (26 U.S.C. 7602).

Thus, the fact that particular material may not have been used in the preparation of the taxpayer's return does not, as petitioner would have it, insulate it from compelled production. Such material nevertheless "may be relevant or material to [the Commissioner's] inquiry" within the meaning of Section 7602(1). Indeed, this Court has upheld the enforcement of summonses to produce material that was not used

in the preparation of the audited returns. See, e.g., *United States* v. *Euge*, 444 U.S. 707 (1980) (enforcing a summons for an exemplar of the taxpayer's handwriting); *Donaldson* v. *United States*, 400 U.S. 517 (1971) (enforcing summons for employment applications, background data).[4] Hence, the appropriate test of relevance that is consistent with the statutory language is whether the documents requested "might have thrown light upon" the correctness of a return. See, e.g., *United States* v. *Arthur Young & Co.*, 677 F.2d 211, 218-219 (2d Cir. 1982), petition for cert. pending, No. 82-687; *United States* v. *Shlom*, 420 F.2d 263, 265 (2d Cir. 1969), cert. denied, 397 U.S. 1074 (1970); *Foster* v. *United States*, 265 F.2d 183, 187 (2d Cir.), cert. denied, 360 U.S. 912 (1959); *United States* v. *Noall*, *supra*, 587 F.2d at 125.

b. Contrary to petitioner's contention (Pet. 11-14), there is no conflict in the circuits on the question of the relevancy of tax pool analyses and similar documents to IRS investigations. As the decision below correctly noted (Pet. App. 12a) its holding that the tax pool analysis is relevant is in accord with a similar ruling of the Second Circuit in *United States* v. *Arthur Young & Co.*, 677 F.2d 211 (1982), petition for cert. pending, No. 82-687. As the court there concluded with respect to tax-accrual workpapers prepared by an independent auditor, "[d]ifferent tax positions lead to different amounts of liability. It is difficult to say that the assessment by the independent auditor of the correctness of

---

[4]Accord: *United States* v. *Noall*, *supra*, 587 F.2d at 125 (internal audit data not used in preparation of returns); *United States* v. *Wyatt*, 637 F.2d 293, 300 (5th Cir. 1981) (evidence relating to illegal payments whether or not deducted on the returns); *United States* v. *Cleveland Trust Co.*, 474 F.2d 1234 (6th Cir.), cert. denied, 414 U.S. 866 (1973) (net worth statements submitted to bank with loan application); *United States* v. *McKay*, 372 F.2d 174 (5th Cir. 1967) (appraisal reports); *United States* v. *New York Telephone Co.*, 644 F.2d 953 (2d Cir. 1981); *United States* v. *Khalauf*, 49 A.F.T.R.2d (P.H.) para. 82-425 (N.D. Ind. 1982) (video tapes).

positions taken by the taxpayer in his return would not throw 'light upon' the correctness of his return" (677 F.2d at 219).

In support of its argument that there is a conflict as to the proper standard of relevancy (Pet. 12-13), petitioner cites *United States* v. *Matras*, 487 F.2d 1271 (8th Cir. 1973), and *United States* v. *Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977). It reads those cases as "squarely" holding that material is not relevant if it is not used in the preparation of the tax return and if it contains opinion and not factual data with respect to actual transactions. But neither of those cases purports to establish a legal standard governing the relevance of summoned material. In those cases, the courts of appeals affirmed, as not clearly erroneous, factual determinations by the trial courts that a proposed corporate budget and a tax pool analysis, respectively, were not relevant to a tax investigation. However, both opinions emphasize the fact-bound nature of the determination of relevancy, and neither court suggested that in no circumstances could such documents be summoned. Indeed, in *Matras*, the court specifically recognized that "given the proper factual setting a court could find that budgets are potentially relevant to a tax investigation. Obviously, that issue must be determined on an ad hoc basis" (487 F.2d at 1274).

Coopers & Lybrand is to the same effect. There, the Tenth Circuit declined to enforce a summons for tax pool analyses on the ground of relevancy. But in so holding, the court quoted with approval the statement of the Eighth Circuit in *Matras* that such issues "must be decided on an ad hoc basis" (550 F.2d at 620). Thus, like the court in *Matras*, the Tenth Circuit in *Coopers & Lybrand* considered particularly persuasive the district court's finding that the summoned material was not relevant to the investigation. As the district court there appraised the record before it: "The

taxpayer-intervenor took the position, and presented evidence and testimony to the effect, that the data sought by the IRS to complete the audit and resolve these areas of concern did not appear in the Tax Pool. The Government did not seek to refute this contention, but then took the position that the Tax Pool might shed some light on other, yet unidentified, areas of tax liability" (413 F. Supp. at 942, 951). Given the state of the record in *Coopers & Lybrand*, the Tenth Circuit was reluctant to disturb the district court's finding of lack of relevancy.

Here, by contrast, the district court found (Pet. App. 46a) that "[t]he two summonses required the production of documents and other records which would very likely be relevant to making a correct determination" of petitioner's federal income and excise tax liabilities for the years under examination. It therefore concluded that "[p]roduction of the documents sought by the summonses in this case is necessary to the accomplishment of an effective examination * * *" (*id.* at 54a). In light of these markedly different findings, the court of appeals properly ruled that "[d]ocuments that focus and concentrate the Service's energy on questionable positions in the return, therefore, are highly relevant" (*id.* at 12a). Indeed, as the court further stated, "[i]t is, in fact, hard to imagine a document more likely to shed light on the correctness of those aspects of a return that harbor doubts than the tax pool analysis" (*ibid.*).

In these circumstances, the most that can be said with respect to the different results reached by *Matras* and *Coopers & Lybrand*, on the one hand, and the decision below and *Arthur Young & Co.*, on the other, is that based upon distinct factual records, four different district courts reached different results as to the relevancy of certain documents, and that these conclusions were affirmed by each of

the courts of appeals. These different results, however, do not constitute a conflict of decisions on a question of law that warrants resolution by this Court.

c. What is more, the standard of relevancy applied by the decision below — whether the records sought might throw light upon the correctness of the return — has been adopted by every court of appeals that has considered the issue, including the Eighth and Tenth Circuits subsequent to *Matras* and *Coopers & Lybrand*. See *United States* v. *Moon*, 616 F.2d 1043 (8th Cir. 1980); *United States* v. *City National Bank & Trust Co.*, 642 F.2d 388, 389 (10th Cir. 1981).

Finally, to the extent that *Matras* and *Coopers & Lybrand* suggest that only data used in the preparation of a tax return and which reflect actual financial transactions are relevant to a tax investigation, that aspect of those decisions has not only been eroded by subsequent decisions of this Court and other courts of appeals (see pages 8-9, *supra*), but by subsequent decisions of the Eighth and Tenth Circuits themselves. *United States* v. *Norcutt*, 680 F.2d 54 (8th Cir. 1982); *United States* v. *Southwestern Bank & Trust Co.*, 683 F.2d 994 (10th Cir. 1982).[5] Hence, there is no conflict on the question of the proper legal standard of relevancy under 26 U.S.C. 7602.

---

[5]Every court that has considered petitioner's interpretation of *Coopers & Lybrand* has rejected it. See *United States* v. *Noall*, *supra*, 587 F.2d at 127; *United States* v. *Arthur Young*, *supra*; *United States* v. *Arthur Andersen & Co.*, 474 F. Supp. 322 (D. Mass. 1979), appeal dismissed as moot as to one party, 623 F.2d 725 (1st Cir.), aff'd on other grounds, 625 F.2d 725 (1st Cir. 1980); *United States* v. *Riley Co.*, 45 A.F.T.R.2d (P.H.) para. 80-551 (N.D. Ill. 1980); *In re Grand Jury Subpoena Duces Tecum (Charles Rice)*, 483 F. Supp. 1085 (D. Minn. 1979); *United States* v. *First Chicago Corp. & Affiliated Corps.*, 43 A.F.T.R.2d (P.H.) para. 79-426 (N.D. Ill. 1978).

2. *Privilege.* Petitioner also seeks review of the decision below that its tax pool analysis is not privileged from disclosure in response to an internal revenue summons. It urges (Pet. 14-16) that the decision here conflicts with *United States* v. *Arthur Young & Co.*, 677 F.2d 211 (2d Cir. 1982), petition for cert. pending, No. 82-687. There, the court refused to enforce a summons directing a certified public accountant to produce tax accrual workpapers prepared in connection with regular financial audits of a publicly held corporation and its certification of the corporation's financial statements to comply with the securities laws. The court rested its decision on the ground of a work-product privilege, although the opinion is couched in the rationale of the accountant-client privilege. As the court saw the matter, "[t]he verification procedure envisioned by the [Securities] Act requires, in turn, that management feel free to cooperate with their auditors, and to disclose to them confidential information, such as the questionable positions taken on tax returns * * *" (677 F.2d at 219). Hence, the court concluded "that the countervailing policies at issue in the case * * * require[d it] to fashion protection for the work that independent auditors, retained by publicly owned companies to comply with the federal securities laws, put into preparation of tax accrual workpapers" (*ibid.*).

While the tax pool analysis at issue here was generated by petitioner's employees in its tax department, rather than by an outside independent auditor as in *Arthur Young & Co.*, the cases are concededly in conflict as to whether such documents — containing an assessment of the questionable items on the return — are privileged from disclosure. Here, the court below enforced an internal revenue summons for the identical category of documents prepared by petitioner's in-house accountants and revealed to its independent accountant as part of the selfsame process of establishing a

reserve for contingent tax liabilities and certifying its financial statements. In so holding, the court below relied upon this Court's admonition in *Couch* v. *United States*, 409 U.S. 322, 335 (1973) that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases * * *." Hence, the court thereby rejected "[t]he logic of *Arthur Young* [that] implies that the taxpayer's revelation of tax accrual workpapers to an accountant should be considered a communication in confidence" (Pet. App. 19a; footnote omitted).

Moreover, the decision below also conflicts with *Arthur Young & Co.* on the question whether such documents constitute privileged work product. Here, the court declined to classify such documents as work product because they were not prepared by attorneys in anticipation of litigation. As the court stated, "the tax pool analysis carries much more the aura of daily business than it does of courtroom combat. We hold, therefore, that the tax pool analysis and backup memoranda are not protected work product materials" (Pet. App. 25a).

Since the second question presented in the petition — whether such documents are privileged from disclosure under an accountant-client or work product privilege — is already before the Court in the petition in *Arthur Young & Co.*, we believe that it would be appropriate for the Court to hold this case to await the disposition of *Arthur Young & Co.*[6]

---

[6]Petitioner also seeks to cloak its tax pool analysis under the protection of the attorney-client privilege (see Pet. 16-17). But the court of appeals ruled that petitioner waived any privilege when its employees discussed many of the issues in the tax pool analysis with its independent auditors (Pet. App. 17a). While petitioner alleges (Pet. 16-17) that there is a conflict in the circuits as to the circumstances in which a waiver of the attorney-client privilege occurs, that argument is predicated on the assumption that the attorney-client privilege is applicable in the first

CONCLUSION

The Court should hold this case to await the ultimate disposition of *United States* v. *Arthur Young & Co.*, No. 82-687, with respect to the second question presented (whether tax accrual workpapers are privileged from disclosure).[7]

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

CARLETON D. POWELL
WILLIAM A. WHITLEDGE
Attorneys

JANUARY 1983

---

instance. Both courts below, however, held that petitioner's failure to prove which documents were prepared by attorneys "considerably undermines its claim to the attorney-client privilege" (Pet. App. 21a) and that petitioner's blanket assertion of the privilege was insufficient (*id.* at 20a). See also *id.* at 56a. There is, accordingly, no occasion to consider the waiver question in this case where there are two independent bases for the court's conclusion that the attorney-client privilege is not applicable.

[7]We are serving a copy of this brief upon counsel for the respondents in *United States* v. *Arthur Young & Co.*, No. 82-687.

DOJ-1983-01